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In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Amici Curiae Office of Communication of the United Church of Christ, Minority Media and Telecommunications Council, Alliance for Community Media, American Federation of Television and Radio Artists, American Hispanic Owned Radio Association, Black College Communication Association, Civil Rights Forum on Telecommunications Policy, Media Action Network of Asian Americans, National Asian American Telecommunications Association, National Association of Black Journalists, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association of Hispanic Journalists, National Association of Minorities in Communications, National Association of Minority Media Executives, National Hispanic Media Coalition, Telecommunications Research and Action Council, and Women's Institute for Freedom of the Press, In Support of Respondents

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Summary of Argument	7
Argument	8
Programs Using The Basic Design Of DOT's Current DBE Program Can Satisfy Strict Scrutiny	8
A. The Court Of Appeals Wisely Afforded Considerable Deference To Congressional Findings And Legislative History	8
B. The Court Of Appeals Correctly Found That DOT's Current DBE Program Served The Compelling Interests Of Not Perpetuating, And Of Remedying, The Consequences Of Racial Discrimination In The Government's Own Distribution Of Federal Funds	14
C. The Court Of Appeals Correctly Found That Discrimination In Contracting Is National In Scope	18
Conclusion	23

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)	*passim*
Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000)	*passim*
Bob Jones University v. United States, 461 U.S. 574 (1983)	14
Brown v. Board of Education, 357 U.S. 483 (1954)	16
Bush v. Gore, 531 U.S. 98 (2000)	20
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	14
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	19
Fullilove v. Klutznick, 448 U.S. 448 (1980)	*passim*
Hirabayashi v. United States, 320 U.S. 81 (1943)	13
Korematsu v. United States, 323 U.S. 214 (1944)	13

Cases (continued)	Page
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	8
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	6
Mitchell v. United States, 313 U.S. 80 (1941)	24
Norwood v. Harrison, 413 U.S. 455 (1973)	14
Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)	1, 16
Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)	16
Oregon v. Mitchell, 400 U.S. 112 (1970)	12, 18
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	6, 9
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	8, 20
United Jewish Organizations v. Carey, 430 U.S. 144 (1977)	19

Page

Cases (continued)

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 12

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) *passim*

Administrative Materials

Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Service, 8 F.C.C.R. 7162 (1993), *modified*, 9 F.C.C.R. 1309 (1994), *further modified*, 9 F.C.C.R. 4519 (1994), *rev'd in part on other grounds sub nom. Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) 19

Glencairn, Ltd., No. 1800E1-LS (FCC Mass Media Bureau, March 15, 1999) 22

New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants, 87 F.C.C.2d 200 (1981) 16

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 16

Page

Administrative Materials (continued)

Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Service Licenses, Sixth Report and Order, 60 Fed. Reg. 37,786 (1995) 21

Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 F.C.C.R. 2329 (2000), *reversed in part sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, *rehearing and rehearing en banc denied*, No. 00-1094 (released June 19, 2001) 17

Review of the Commission's Regulations Governing Television Broadcasting, 14 F.C.C.R. 12,903 (1999) 20

Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 F.C.C.R. 6280 (1996) 17

Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 15 F.C.C.R. 15,376 (2000) 22

Page

Administrative Materials (continued)

Southland Television Co., 10 Rad. Reg. (P & F) 699, *recon. denied*, 20 F.C.C. 159 (1955) 16

Ultravision Broadcasting Company, 1 F.C.C.2d 545 (1965) 16

U.S. Constitution

U.S. Const., Amend. 13 8

U.S. Const., Amend. 14 10

Statutes and Legislative Materials

47 U.S.C. § 151 (1996) 15

47 U.S.C. § 257(a) (1996) 22

47 U.S.C. § 307(a) (1996) 16

Page

Statutes and Legislative Materials (continued)

49 U.S.C. § 3(1) (1958) 15

Administrative Procedure Act, 5 U.S.C. § 553 (2001) 21

Hearings on H.R. 8301 Before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Cong. 2d Sess. 14 (1934) (testimony of Dr. Irvin Stewart, Department of State) (reprinted in Max D. Paglin, ed., *A Legislative History of the Communications Act of 1934* 360 (1989) 15

H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982) 22

Interstate Commerce Act, Part I, 24 Stat. 380 (1887) 15

Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, 2, 109 Stat. 93 (1995) 21

Page

Other Authorities

S.J. Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Peña*, 4 CommLaw Conspectus 237 (1996) 17

BIA Financial Network, *Television Market Report 2001* (2001) 20

BIA Financial Network, *Radio Market Report 2001* (2001) 20

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FCC Office of General Counsel, Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present (December, 2000) 22

Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963* (1988) 23

Address of General Colin Powell, Republican National Convention, August 12, 1996 23

INTEREST OF AMICI CURIAE

Amici comprise a broad spectrum of nonprofit, nonpartisan organizations with decades of experience with issues falling in the intersection between communications policy and civil rights.[1]

The Office of Communication of the United Church of Christ ("OC/UCC"), founded in 1965, is an instrumentality of the United Church of Christ, a Protestant denomination of approximately 1.6 million members nationwide. OC/UCC was the first program of national scope aimed at promoting racial diversity in the mass media. Its pioneering work in integrating southern television stations led to the landmark ruling affirming the standing of listeners and viewers to participate in broadcast licensing proceedings. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*"UCC I"*). OC/UCC has participated in dozens of FCC proceedings over the past four decades as an advocate for minorities and women in the mass media and in telecommunications.

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1 Pursuant to S. Ct. Rule 37.3(a), *amici* affirm that consent to file this brief has been granted by all parties. Pursuant to S. Ct. Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

The Minority Media and Telecommunications Council ("MMTC") is an association of lawyers, engineers and scholars who provide *pro bono* support to civil rights organizations in policy and rulemaking matters before the FCC. MMTC promotes FCC rules and private industry initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities. MMTC also operates the nation's only minority-owned media and telecommunications brokerage.

The Alliance for Community Media represents public, educational and governmental access organizations and public access internet centers throughout the country. The Alliance helps assure broad access to electronic media through public education, building coalitions and supporting local organizing.

The American Federation of Television and Radio Artists, AFL-CIO ("AFTRA"), originally founded as the American Federation of Radio Artists in 1937, is a national labor organization representing over 80,000 performers and newspersons employed in the news, entertainment, advertising and sound recording industries. AFTRA negotiates and administers over 300 national and local collective bargaining agreements with producers, broadcasters, cable programmers, recording labels, advertising agencies and other employers of performers and journalists nationwide.

The American Hispanic Owned Radio Association ("AHORA") promotes business opportunities for Hispanic American broadcasters. AHORA seeks to increase the number of Hispanic Americans in the broadcasting industry and protect the interests of the Hispanic American broadcast station owners.

The Black College Communications Association ("BCCA") is composed of 28 institutions of higher education with broadcasting or journalism programs. BCCA develops intercollegiate efforts to advance black students' entry into media professions.

The Civil Rights Forum on Telecommunications Policy is a project of the Tides Center. The Forum is a research and educational organizations which analyzes communications policy with a focus on equal rights under the law and democratic values.

The Media Action Network of Asian Americans is dedicated to monitoring the mass media and advocating balanced, sensitive and positive coverage and depiction of Asian Americans.

The National Asian American Telecommunications Association is an association of filmmakers, educators and community leaders engaged in and supporting the production, presentation and distribution of Asian American films and videos designed to educate the American public about Asian American history and contemporary life.

The National Association of Black Journalists ("NABJ") is composed of over 3,000 black journalists. NABJ holds conferences and organizes mentoring and membership assistance programs aimed at increasing minority participation in print and electronic journalism.

The National Association of Black Owned Broadcasters is ("NABOB") is composed of over 200 commercial radio and television stations. NABOB counts law firms, station brokers, national rep firms, and financial institutions as associate members. NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success for African Americans and all other minority station owners.

The National Association of Black Telecommunications Professionals ("NABTP") is composed of 1,200 telecommunications professionals, small business owners and students. NABTP's mission is to be the premier source of education and information about the telecommunications industry for its members, interfacing organizations and the public, with a specific emphasis on the black community.

The National Association of Hispanic Journalists includes 1,500 working journalists, other media professionals, students and scholars. It is dedicated to the recognition and professional advancement of Hispanics in the news industry.

The National Association of Minorities in Communications, through its local chapters, promotes employment, program service, goods and services contracting, and ownership of cable television companies by minorities.

The National Association of Minority Media Executives ("NAMME") is an organization of media news and business managers and executives working in newspapers, broadcasting, magazines and new media. NAMME encourages diversity in the senior ranks of the media industry, as well as better coverage of multicultural communities. It offers executive development programs, management training and mentoring of new and middle managers.

The National Hispanic Media Coalition ("NHMC") is an association of two dozen constituent organizations representing all facets of Hispanic American business, consumer, educational and cultural life. NHMC strives to stimulate employment and ownership opportunities for Hispanics in all mass media.

The Telecommunications Research and Action Council ("TRAC") promotes the interests of residential telecommunications consumers. TRAC seeks to expand telecommunications service to all Americans, bridging the racial and economic "digital divide" in access to telecommunications technology.

The Women's Institute for Freedom of the Press is a national network of media women seeking to extend freedom of the press to a wide array of individuals and organizations.

Amici concur with the *amicus* briefs being filed by the Lawyers Committee for Civil Rights Under Law *et al.*, the Minority Business Enterprise Legal Defense Fund, Inc. *et al.* and the National Asian Pacific American Legal Consortium *et al.*

Federal programs designed, *inter alia*, to remedy the effects of past discrimination most often arise in three contexts: procurement (*e.g.*, the case at bar), education (*e.g., Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978) ("*Bakke*") and communications (*e.g., Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990)). *Amici* are focused on communications. Each *amicus* has advocated congressionally mandated FCC policies designed to remedy the effects of past discrimination, proscribe current discrimination, prevent future discrimination, promote economic opportunity and competition and expand access to a broad diversity of viewpoints.

The standards for judicial review of these programs are potentially at issue in this case. Consequently, *amici* aim to draw the Court's attention to those aspects of this case which are most likely to reverberate in the world of media and telecommunications.

SUMMARY OF ARGUMENT

The Court should reaffirm that Congress' "comprehensive remedial power" is broad enough to include measures to eliminate barriers that excluded minorities from government benefits. *Fullilove v. Klutznick,* 448 U.S. 448, 483 (1980) ("*Fullilove*"). In doing so, this Court should consider three portions of the court of appeals' decision in *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*") to be especially worthy of affirmance.

First, the court of appeals acted wisely in deferring to congressional fact-finding. *See infra* pp. 8-14.

Second, the court of appeals accurately defined the compelling governmental interests in need of remediation. Those interests are not perpetuating, and remedying, the consequences of the government's use of tax revenues to facilitate race discrimination. *See infra* pp. 14-18.

Third, the court of appeals correctly recognized that Congress is empowered to determine that discrimination in contracting is national in scope and requires a national remedy. *See infra* pp. 18-23.

ARGUMENT

Programs Using The Basic Design Of DOT's Current DBE Program Can Satisfy Strict Scrutiny

In its decision below, the Court of Appeals has provided a useful and easily understandable model for discerning whether the government's interest in remedying discrimination in a particular industry or institution is compelling and whether the remedy is narrowly tailored to the injury. Three well-reasoned portions of the court of appeals' decision particularly deserve affirmance.

A. The Court Of Appeals Wisely Afforded Considerable Deference To Congressional Findings And Legislative History

Congress has extensive remedial power to confront society-wide inequality and discrimination. In addressing these problems, Congress' freedom to choose legislative ends and means is long-established,[2] and has been reaffirmed in *Fullilove*. The Court in *Fullilove* dealt squarely with the racial aspects of the remedial program under consideration and the nature and quantum of

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2 *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (holding that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("[a]s against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.")

evidence needed to justify it.[3] As the court of appeals accurately noted, "nothing in *Adarand III* [*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)] undermines the conclusion of the lead *Fullilove* opinion that 'Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement

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3 In *Fullilove*, the Court did not use the term "strict scrutiny", although Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.*, 448 U.S. at 491. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied "strict scrutiny" as described in his opinion in *Bakke* -- *i.e.*, it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest", and had done so correctly. *Fullilove*, 448 U.S. at 496 (Powell, J., concurring).

practices that perpetuated the effects of prior discrimination.'") *Adarand VII* at 1175 n. 17.[4]

In its review of Congress' intentions, the court of appeals assessed the legislative history and the evidence of record to determine whether the asserted governmental interest was compelling. While discarding conclusory statements of elected officials,[5] the court of appeals deemed it only fair to

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4 In *Fullilove*, Chief Justice Burger stated that "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation the equal protection guarantees of the Fourteenth Amendment' . . ." 448 U.S. at 472. Chief Justice Burger explained that "[i]n dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment." *Id.* Recognizing that *Fullilove* was overruled largely because it failed to apply strict scrutiny, the court of appeals concluded that *Adarand III* had left in place other holdings of *Fullilove*, "most notably its factual determinations regarding congressional findings and the legislative history of the SBA discussed in the Chief Justice's opinion and further elaborated upon in the concurring opinion of Justice Powell." *Adarand VII*, 228 F.3d at 1162 n. 6. The evidence in *Fullilove* included a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises, much of which resulted from barriers to competitive access which had its roots in race discrimination, including discrimination traceable to federal, state and local contracting. *Fullilove*, 448 U.S. at 478.

5 *Adarand VII*, 228 F.3d at 1167 ("[o]f course, statements made with regard to discrimination in the subcontracting industry by congressional reports and by members of Congress are insufficient in themselves to support a finding of compelling interest.")

consider the widest range of competent evidence -- statistical and anecdotal, direct and circumstantial, pre-enactment and post-enactment. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 293 (1986) (O'Connor, J., concurring) ("*Wygant*") (statistical proof supplies the court with the means for concluding that remedial acts are appropriate.)[6]

Upon evaluating the evidence, the court of appeals found extensive exclusion of minority contractors and barriers to entry. *Adarand VII*, 228 F.3d at 1167-76. DOT submitted extensive evidence of public and private discrimination in

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6 When a judge considering a race-conscious remedial program admits all of the proferred evidence she fairly can admit -- but nonetheless holds that the program fails to satisfy strict scrutiny -- the litigants will appreciate that the program failed because of its substantive legal shortcomings, not because of procedural rulings. On the other hand, a program that deserves approval under strict scrutiny should not be undermined by a judge's needlessly crabbed evidentiary rulings. Given the high evidentiary hurdle required under the strict scrutiny standard, there is little risk that weak evidentiary showings could ever lead to the routine authorization of race-conscious programs.

government procurement and in highway construction generally. *Id.* at 1166-67.[7] The court of appeals found that this discrimination inhibited entry by minority contractors and distorted the market for public contracts so that the overwhelming majority of contracts went to firms owned by white men. *Id.* at 1170-73. Finally, the court of appeals affirmed the trial court's conclusion that the evidence showed "a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 1167-68.

The court of appeals also properly deferred to Congress' evaluation of potential narrowly tailored remedies. DOT provided extensive documentation that race-neutral remedies had proven unsuccessful. Drawing its key inference from strong evidentiary

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7 The overwhelming array of competent research by disinterested academics contained in the record of this case would have permitted any reviewing court to find the asserted governmental interest to be compelling. Indeed, the weight and sufficiency of the evidence calls to mind *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n. 1 (1979), where this Court found that "judicial findings of exclusiveness from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *See also Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) ("*Mitchell*") (unanimously upholding ban on literacy tests where Congress had "substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement.")

findings, the court of appeals found that when race-conscious public contracting programs had been struck down or discontinued, minority business participation in the relevant market declined sharply or even disappeared. *Id.* at 1174. The court of appeals recognized that Congress only implemented a race-conscious remedy because of a fact Congress could not avoid: its "efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures" had failed to remedy the consequences of "[t]he long history of discrimination in, and affecting, the public construction procurement market[.]" *Id.* at 1178. Thus, the court of appeals acted reasonably in finding that race-neutral steps were palpably insufficient to provide a meaningful remedy. Its findings were firmly grounded in the historical record, not in "paternalistic stereotyping."[8]

In all respects, then, the court of appeals' deference to Congress and the manner in which the court of appeals exercised that deference were reasonable and consistent with precedent.

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8 *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment) (*discussing Bakke*, 438 U.S. at 360-361). *Amici* note that strict scrutiny is not a failsafe device for excluding racial prejudice from government decisionmaking, as was most painfully demonstrated in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). In both cases, despite assurances that strict scrutiny was being applied, the Court upheld the government's internment of Japanese Americans solely on the basis of their ancestry. The wisdom to be taken from *Korematsu* and *Hirabayashi* is not that strict scrutiny review should be even stricter, but that it should be sensitive enough to exclude stereotyping while allowing government to achieve its lawful objectives.

B. The Court Of Appeals Correctly Found That DOT's Current DBE Program Served The Compelling Interests Of Not Perpetuating, And Of Remedying, The Consequences Of Racial Discrimination In The Government's Own Distribution Of Federal Funds

In the affirmative action context, the Court has identified three potentially compelling governmental interests. The first two were defined in *Wygant* as "remedying past or present racial discrimination by a state actor" and "promotion of racial diversity . . . at least in the context of higher education." *Id.*, 476 U.S. at 286 (O'Connor, J., concurring). A third rationale is government's "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).[9]

In *Adarand VII*, the court of appeals correctly defined the applicable compelling governmental interests as "not perpetuating the effects of racial

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9 As this Court has recognized, government acts impermissibly when it distributes public resources in a manner that perpetuates discrimination. *See Bob Jones University v. United States*, 461 U.S. 574, 595 (1983) (holding that government should not encourage educational institutions that practice racial discrimination "by having all taxpayers share in their support by way of special tax status"); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (holding that it is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted). Awarding contracts to firms that discriminate privately is "inducing, encouraging or promoting" discrimination."

discrimination in [the government's] own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by [government] disbursements." *Adarand VII*, 228 F.3d at 1165. The court of appeals' definitions of the compelling governmental interests resonate strongly with *amici*, whose civil rights work centers on the communications industries. Like highway transportation, communications uses public rights-of-way to foster national social and economic interaction. Regulation of transportation and communications each descended from the same statutory progenitor -- the Interstate Commerce Act, which was enacted in 1887.[10] The first sentence of the legislation authorizing the FCC provides that the agency was created, *inter alia*, "so as to make available, so far as possible, to all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (emphasis supplied).[11]

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10 *Hearings on H.R. 8301 Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 73rd Cong. 2d Sess. 14 (1934) (testimony of Dr. Irvin Stewart, Department of State) (reprinted in Max D. Paglin, ed., *A Legislative History of the Communications Act of 1934* 360 (1989) (describing how communications and transportation regulation each evolved from the Interstate Commerce Act).

11 47 U.S.C. § 151 (1996). *Compare* Interstate Commerce Act, Part I, 24 Stat. 380 (1887), 49 U.S.C. § 3(1) (1958) (prohibiting common carriers from giving "undue or unreasonable preference or advance to any particular person . . . in any respect whatsoever, or [subjecting] any particular person . . . to any unreasonable or undue prejudice or disadvantage.")

Like DOT, the FCC contravened its mandate for decades by providing extensive and unseemly assistance to discriminators. Acting through its exclusive power to issue broadcast licenses,[12] the FCC routinely provided, renewed and authorized the assignment and transfer of licenses to segregated companies and institutions.[13] These licensees, in

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12 47 U.S.C. § 307(a) (1996).

13 Even after *Brown v. Board of Education*, 357 U.S. 483 (1954), the FCC routinely granted and renewed licenses of broadcasters that discriminated, and in doing so openly embraced state segregation laws. *See, e.g., Southland Television Co.*, 10 Rad. Reg. (P & F) 699, *recon. denied*, 20 F.C.C. 159 (1955), in which the FCC awarded a VHF-TV license to a segregationist so rabid that he built one-story movie theaters to evade Louisiana's law requiring theater owners to admit blacks to one floor of a two-story theater. The FCC justified its action by declaring that "[a]dmission of Negroes [only] to theatre balconies appears to be legal in Louisiana." *Id.* at 750. *See also UCC I* (requiring the FCC to hold a hearing on allegations that WLBT-TV, Jackson, MS, discriminated against blacks in programming) and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) ("*UCC II*") (vacating WLBT-TV's license renewal after the FCC held a sham hearing). Segregation in broadcast education denied minorities an opportunity to obtain broadcast experience and a record of broadcast operation, yet the FCC still credited these factors when awarding broadcast licenses in comparative hearings. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 396-98 (1965). Finally, the FCC did not repeal an overbroad broadcast financial requirement until 1981, when it recognized that the former rule prevented minorities from securing broadcast licenses. *New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981) (*repealing Ultravision Broadcasting Company*, 1 F.C.C.2d 545, 547 (1965)).

turn, trained the next generations of broadcaster owners and managers. These FCC licensing decisions ensured that two successive generations of broadcast professionals, managers and owners were almost exclusively white and male.[14] In communications as in highway construction, substantial remediation will be required to overcome the natural tendency of a homogeneous group to replicate itself in successive generations.[15]

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14 Eventually, the FCC acknowledged that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and . . . special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry)*, 11 F.C.C.R. 6280, 6306 (1996).

15 An effort by the FCC to remedy and prevent discrimination in broadcast and cable employment by requiring broad job recruitment was recently rejected by the D.C. Circuit, which applied strict scrutiny. *Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies*, 15 F.C.C.R. 2329 (2000), *reversed in part sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, *rehearing and rehearing en banc denied*, No. 00-1094 (released June 19, 2001). Dissenting from the denial of rehearing *en banc*, Judges Tatel, Edwards and Rogers noted that "[d]etermining whether an outreach program crosses the line from expanding opportunities for minorities to disadvantaging nonminorities, thus triggering strict scrutiny - and if so whether the program survives - are difficult issues that neither we nor the Supreme Court has yet considered." Dissenting Opinion, Slip Op. at 5. A thorough discussion of the FCC's EEO jurisprudence may be found in S.J. Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Peña*, 4 CommLaw Conspectus 237 (1996).

Regulatory initiatives such as DOT's and the FCC's, backed by strong records that include legislative findings, are uniquely suited to achieve comprehensive remedies. The Court should defer to Congress, and administrative bodies with subject matter expertise, when they undertake to research and remedy the consequences of government-sponsored and government-aided discrimination.

C. The Court Of Appeals Correctly Found That Discrimination In Contracting Is National In Scope

When discrimination occurs nationally, its remedy must be structured nationally. As the court of appeals found here, "[t]he remediation of nationwide problems . . . is particularly within the purview of Congress, and findings of industry-wide discrimination are precisely what is relevant to a federal decision to undertake remedial action." *Adarand VII*, 228 F.3d at 1163 n.8.

It is well established that Congress need not measure the extent of a problem in every corner of the nation to find that it must implement reform nationally. *See, e.g., Mitchell*, 400 U.S. at 133 (upholding Congress' determination that a nationwide ban on literacy tests was appropriate where "Congress has recognized a national problem for what it is -- a serious *national* dilemma that

touches every corner of our land" (emphasis in original)).[16]

Congress' ability to address nationwide discrimination through nationwide solutions is essential to the effective regulation of every industry that operates across state lines. The industries with which *amici* are most concerned present a prime example. Personal Communications Service (PCS) telephony operates in 492 local markets.[17]

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16 National remediation for national discrimination has an additional advantage: it ensures that the burden of remediation of the conditions caused by nationwide practices is not borne by citizens of only a few communities. As this Court has pointed out, spreading the costs of remediation is a primary goal of narrow tailoring. *See Wygant*, 476 U.S. at 281 ("when effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible" (*quoting Fullilove*, 448 U.S. at 484, *in turn quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)). However, a remedy should only "impose a diffuse burden, often foreclosing only one of several opportunities[.]" *Wygant*, 476 U.S. at 283. *See also United Jewish Organizations v. Carey*, 430 U.S. 144, 165 (1977) (redistricting plan authorized no "fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.")

17 *See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Service*, 8 F.C.C.R. 7162, 7167 ¶ 28 (1993), *modified*, 9 F.C.C.R. 1309 (1994), *further modified*, 9 F.C.C.R. 4519 (1994), *rev'd in part on other grounds sub nom. Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

Television and cable television are organized into 211 different Nielsen-rated television markets.[18] Radio is organized into 283 Arbitron-rated markets.[19] A requirement that legislation be particularized to address each parochial quirk of discrimination in each of these markets would place the cost of designing remediation far out of reach. Such an interpretation would render strict scrutiny aimed at redressing nationally-occurring discrimination "fatal in fact"[20] for every federal program.[21]

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18 *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903, 12,926 ¶ 47 (1999). These markets are identified and ranked in BIA Financial Network, *Television Market Report 2001* 4-5 (2001).

19 These markets are identified and ranked in BIA Financial Network, *Radio Market Report 2001* 4-5 (2001).

20 *Adarand III*, 515 U.S. at 237 (*quoting Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment)).

21 A closely analogous situation is found in the field of voting rights. This Court recently found that citizens in multiple jurisdictions within a state deserve roughly equivalent treatment at the polls. *Bush v. Gore*, 531 U.S. 98, Slip Op. at 6 (2000) ("[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.") National standards may be the only way to address this and other problems of national scope. As this Court has recognized in the voting rights field, "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina v. Katzenbach*, 383 U.S. at 328.

Opening the door, narrowly, to national remedies that satisfy strict scrutiny is unlikely to engender a host of poorly designed initiatives. When drafting any remedial regulations, federal agencies typically spend hundreds of thousands of dollars to carefully define the harm to be remedied or prevented, and to structure the remedy so as to avoid over- or under-inclusiveness or disproportionate burdens on third parties. These expenditures are subject to congressional oversight, and to the transparency inherent in the administrative rulemaking process.[22]

In its recent efforts to remedy its previous record of subsidizing discrimination, the FCC provides a commendable example of responsible remediation.[23] At every stage of its administration

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22 *See* Administrative Procedure Act, 5 U.S.C. § 553 (2001) (providing for publication of proposed rules, consideration of comments, and public justification of the basis for rules upon their adoption).

23 Immediately following *Adarand III*, the FCC suspended the race- and gender-conscious provisions of its regulations governing auctions of certain wireless facilities, in large part to avoid delays that might have resulted from litigation. *Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Service Licenses, Sixth Report and Order*, 60 Fed. Reg. 37,786 (1995). Another very successful FCC program, the tax certificate policy, initiated in 1978, provided sellers of broadcast and cable properties with a tax deferral incentive to sell to a minority owned business. Congress eliminated this policy in 1995. Self-Employed Persons Health Care Deduction Extension Act of 1995, Pub. L. No. 104-7, 2, 109 Stat. 93 (1995). A thorough discussion of the FCC's minority ownership policies may be found in A. Bush and M. Martin, *The FCC's Minority Ownership Policies From Broadcasting to PCS*, 48 Fed. Comm. L.J. 423 (1996).

of programs designed to foster minority ownership and employment, the agency has acted pursuant to congressional oversight.[24] The FCC has conducted extensive research to fashion its remedial initiatives,[25] and it has undertaken genuine efforts to use the least burdensome, least race-conscious and most effective approaches available.[26] Moreover, the FCC has undertaken to detect fronts, frauds and abuse.[27] The methodological,

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24 *See, e.g.*, H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982) (finding the paucity of minority broadcast licensees to be partly attributable to past discrimination). *See also* 47 U.S.C. § 257(a) (1996) (requiring the FCC to complete a proceeding to eliminate "market entry barriers for entrepreneurs and other small businesses" in telecommunications), pursuant to which the FCC issued its *Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, 15 F.C.C.R. 15,376 (2000).

25 *See, e.g.*, FCC Office of General Counsel, Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present (December, 2000).

26 *See* supra p. 17 n. 15 (describing recent history of the FCC's efforts to fashion a broadcast and cable employment recruitment program).

27 *See, e.g., Glencairn, Ltd.*, No. 1800E1-LS, at 2 (FCC Mass Media Bureau, March 15, 1999) (on file with counsel of record) (opening an investigation, *inter alia*, into whether provisions of an agreement under which a television licensee was required to use the programming services of a much larger licensee "violated the [smaller] licensee's fundamental right and obligation to determine the type of programming to be aired on its station.") The Bureau was responding to allegations that the larger television licensee improperly exercises *de facto* control of the smaller licensee.

incremental and deliberate approach to remediation taken by agencies such as the FCC suggests that federal agencies will act responsibly if this Court validates DOT's current DBE program.

CONCLUSION

For over two generations, equal access to transportation has occupied a central place in our nation's civil rights history and jurisprudence.[28] This case presents the Court with an historic opportunity to affirm that all Americans may enjoy a reasonable opportunity not only to ride on our highways, but to build them.

Our Secretary of State has framed the federal government's remedial duty as "not only to cut off and kill discrimination, but to open every avenue of educational and economic opportunity to those who are still denied access because of their race, ethnic background or gender." Address of General Colin Powell, Republican National Convention, August 12, 1996. The task of opening "every avenue of . . . opportunity" is not so daunting that it entirely evades solution. By affirming the court of appeals, this Court can enable Congress, and agencies acting under its direction, to deliver us at last to a time and place where none of us bears the weight of past discrimination.

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28 *See Mitchell v. United States*, 313 U.S. 80, 95 (1941) (holding that failure to provide blacks with first-class accommodations equal to those furnished whites violated the Interstate Commerce Act). *See also generally* Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963* 143-205 (1988) (discussing Montgomery bus boycott and its aftermath).

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(43) D (175)